

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

TOMMY HAUBRICH,

Petitioner,

v.

Civil Action No. 5:18CV139
(STAMP)

FREDERICK ENTZEL,

Respondent.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE

I. Procedural History

The pro se¹ petitioner, Tommy Haubrich, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. ECF No. 1. The petitioner is currently incarcerated at FCI Hazelton in Bruceton Mills, West Virginia. In his petition, petitioner challenges his sentence asserting that his sentence as a career criminal is no longer valid. ECF No. 1. For relief, the petitioner requests this Court vacate his sentence and/or conviction.

This civil action was referred to United States Magistrate Judge James E. Seibert under Local Rule of Prisoner Litigation Procedure 2, and then reassigned to United States Magistrate Judge James P. Mazzone. Magistrate Judge James P. Mazzone issued a

¹"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1416 (10th ed. 2014).

report and recommendation (ECF No. 7) recommending that the petitioner's petition (ECF No. 1) be denied and dismissed without prejudice. The petitioner did not file objections to the report and recommendation. For the following reasons, this Court affirms and adopts the report and recommendation in its entirety.

II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. As to findings where no objections were made, such findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Because the petitioner did not file any objections to the report and recommendation, the magistrate judge's findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

III. Discussion

In his report and recommendation, the magistrate judge correctly noted that in the instant case, although petitioner asserts that he is entitled to relief under the savings clause, it is clear that he is not entitled to its application. ECF No. 7 at 8. Here, the petitioner's claim attacks the validity of his sentence, imposed by the Western District of Missouri, asserting that under Mathis v. United States, 136 S. Ct. 2243 (2016), his

Pennsylvania conviction for aggravated assault does not categorically qualify as a crime of violence and exceeds the scope of the generic definition of aggravated assault. ECF No. 7 at 9. However, as the magistrate judge correctly determined, to the extent that the petitioner requests that the Court vacate his conviction, it is clear that the crimes for which he was convicted remain criminal offenses and, therefore, he cannot satisfy the second element of the Jones² test. ECF No. 7 at 8. Furthermore, with respect to his sentence challenge, the magistrate judge determined that even if the petitioner could satisfy the first and third prongs of Wheeler³, he has not established that, after his first § 2255 motion, the “settled substantive law [that established the legality of his sentence] changed and was deemed to apply retroactively on collateral review,” as required by the second prong. Id. at 7-8. Upon review, the magistrate judge concluded that the petitioner’s claim is not properly considered under § 2241. ECF No. 7 at 10. Thus, the magistrate judge recommended that the petitioner’s petition (ECF No. 1) be denied and dismissed without prejudice. ECF No. 7 at 10.

Upon review, this Court finds no clear error in the determinations of the magistrate judge and thus upholds his recommendation.

²In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000).

³United States v. Wheeler, 886 F.3d 415 (4th Cir. 2018).

IV. Conclusion

For the reasons set forth above, the report and recommendation of the magistrate judge (ECF No. 7) is AFFIRMED and ADOPTED in its entirety. Accordingly, the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (ECF No. 1) is DENIED and DISMISSED WITHOUT PREJUDICE.

This Court finds that the petitioner was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action would result in a waiver of appellate rights. Because the petitioner has failed to object, he has waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

It is ORDERED that this civil action be DISMISSED and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se petitioner by certified mail and to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: May 7, 2019

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE